STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
Lorenzo Nelson,	)	
	)	
Complainant,	)	
	)	
and	)	Case Nos. 2005-CA-0034-S
	)	2006-CA-0003-S
Cairo School District No. 1,	)	
	)	
Respondent.	)	

OPINION AND ORDER

On November 29, 2006, Administrative Law Judge ("ALJ") RyAnn McKay issued a Recommended Decision and Order in this case. The hearing had been conducted by ALJ Sharon Purcell, who made findings of fact prior to leaving the employment of the Board. ALJ McKay determined that Cairo School District No. 1 ("District") had violated Section 14(a)(1) of the Illinois Educational Labor Relations Act, 115 ILCS 5/1 et seq. ("Act") by threatening to subcontract work if the contract was not ratified. ALJ McKay also determined that the District had violated Sections 14(a)(4), 14(a)(3) and 14(a)(1) of the Act by refusing to give Complainant Lorenzo Nelson a pay raise, suspending him without pay for personal use of a District vehicle, refusing to renew his employment contract as Maintenance Head, reprimanding him for personal use of a District vehicle on a second occasion, and requiring him to provide a physician's certificate when using sick leave.

The District filed timely exceptions to ALJ McKay's Recommended Decision and Order, together with a supporting brief. Nelson filed a response to the District's exceptions.

We have considered ALJ McKay's Recommended Decision and Order, ALJ Purcell's findings of fact, the District's exceptions and the parties' briefs. We have also considered the record and applicable precedents. For the reasons in this Opinion and Order, we affirm ALJ McKay's Recommended Decision and Order as modified in this Opinion and Order.

I.

The District asserts that the Illinois Educational Labor Relations Board ("IELRB") should remand this case for a new hearing before a different ALJ. The District argues that, although the case was

transferred from one ALJ to another, ALJ McKay did not set forth or explain ALJ Purcell's credibility finding or resolve certain alleged conflicts in the testimony.

Here, ALJ Purcell made findings of fact. The General Counsel issued an order transferring the case to ALJ McKay to apply the law to ALJ Purcell's factual findings. ALJ McKay incorporated ALJ Purcell's findings of fact in her Recommended Decision and Order, but also made certain changes.

We adopt ALJ Purcell's findings of fact, with corrections that do not implicate the credibility of witnesses and supplemented by certain uncontested facts raised by the District. ALJ Purcell's credibility findings can be regarded as incorporated in her findings of fact. She stated in a footnote to her findings of fact that her findings of fact were based on the evidence that she had determined to be relevant and credible, and that, in all cases in which the evidence was in conflict, her findings were based on the evidence that she determined was credible. We find that, where ALJ Purcell did not make a credibility finding, a credibility finding is unnecessary to our resolution of this case. Therefore, we do not remand the case for a new hearing before a different ALJ. We set forth ALJ Purcell's findings of fact in their entirety as follows.

Findings of Fact[1]

1. At all times material herein, Cairo School District No. 1 has been, and is, an educational employer within the meaning of Section 2(a) of the Act.
2. At all times material herein, Lorenzo Nelson has been an educational employee within the meaning of Section 2(b) of the Act.
3. At all times material herein, Laborers International Union, Local 773 ("Local 773") has been, and is, an employee organization within the meaning of Section 2(c) of the Act and an exclusive representative within the meaning of Section 2(d) of the Act.
4. At all times material herein, Nelson has been a member of a bargaining unit of District employees represented by Local 773.

[1] My findings of fact are based on the parties' stipulations, and the testimony and documentary evidence in the record that I have determined to be relevant and credible. In all cases in which the evidence is in conflict, my findings are based on the evidence that I determined was credible. Whether or not explicitly set forth in the decision itself, all credibility resolutions are based upon my assessment of the witnesses' demeanors. My findings of fact also reflect that some witnesses gave credible testimony on some issues in dispute, but not on other disputed points. *See, Consolidated High School District 230*, 7 PERI 1079 at IX-305, n.1, Case No. 90-CA-0058-C (IELRB Opinion and Order, June 19, 1991).

5. During the 2002-2003 school year, a Financial Oversight Panel ("FOP") was appointed to oversee the operations of the District.

6. Nelson was employed by the District for approximately fifteen years. For the most recent five years, Nelson was employed as a maintenance employee and for the most recent four years as a Maintenance Supervisor.

7. In 2004, Dr. Samuel Harbin, who had served on the FOP, was appointed Interim District Superintendent. Harbin testified that as Interim Superintendent, his goal was to help the District regain fiscal solvency. Toward that end, Harbin examined the District's finances, including the overtime paid to employees.

8. In August 12, 2004, Harbin spoke with Nelson about his overtime. Nelson's reported overtime decreased over the next four months.

9. Harbin discussed the overtime reported by Nelson and other bargaining unit members with Local 773 Business Agent John Price.

10. In February 2005, the District and Local 773 entered into a one year agreement under which Nelson would become Maintenance Head. (R. ex. 4)[2] The position was a twelve-month position to run from July 1 to June 30 at a salary of $31,000. Harbin and Price negotiated the agreement. (R. ex. 4)

11. The District and Local 773 entered into the agreement because Harbin believed the District could not afford to keep paying that level of overtime. The agreement provided that the Maintenance Head would be evaluated annually. The District initially proposed to set the Maintenance Head salary at $29,000. However, Local 773 Business Agent John Price, who negotiated the agreement, proposed a salary of $31,000, which the District accepted. Local 773 and the District agreed that the Maintenance Head position would be a bargaining unit position. The collective bargaining agreement was not amended to incorporate the Maintenance Head position agreement.

12. Nelson did not participate in the negotiations for the agreement and was not a party to the agreement. Nelson testified that Price did not inform him at the time of the terms being negotiated for the position. Nelson testified that Harbin told him that if he did not accept the Maintenance Head position, he would

[2] ALJ Purcell stated that she would refer to Administrative Law Judge exhibits as "ALJ ex. __", to the joint exhibits as "Jt. ex. __", to the Complainant's exhibits as "C. ex. __", to the Respondent's exhibits as "R. ex. __", and to the hearing transcript as "Tr. ___".

be reassigned back to a security position, in which he had been assigned prior to moving into maintenance. Nelson understood that after the first year of serving as Maintenance Head under the agreement, he would receive a three-year extension on the position.

13. Under the agreement, Nelson received a raise in pay in excess of ten percent. However, unlike in his previous maintenance position, Nelson was to be on call to answer maintenance calls at any time for which he would not receive overtime pay. In the previous year, Nelson received approximately $3,000 in overtime pay for such call-outs. (R. ex. 1) As Maintenance Supervisor, Nelson would receive one to two hours of overtime pay even if the job for which he was called out was completed in less time. Harbin did not believe that it was reasonable to continue paying so much in overtime.

14. Nelson's duties as Maintenance Head were the same as those he performed as Maintenance Supervisor except that he was responsible to respond whenever he was called out and he would not receive overtime pay for the call-outs. Harbin told Nelson that he was doing an excellent job.

15. In January 2005, the District and Local 773 began negotiating a successor collective bargaining agreement to the 2004-2005 agreement that was due to expire on June 30, 2005. Union steward Martha Rushing was present at all of the bargaining meetings. Price also participated in some of the meetings. Bargaining unit members were also present but were not bargaining team members. Harbin negotiated on behalf of the District. According to Harbin, the parties never discussed the Maintenance Head position or a pay raise for Nelson or any other individual raises. On January 6, 2005, Harbin proposed a salary increase for the bargaining unit. Nelson's name was not included in the list of bargaining unit employees who would receive the salary increase. (R. ex. 6) According to Harbin, Nelson was not included because as Maintenance Head he was in a salaried rather than hourly position.

16. On March 17, 2005, the District agreed to a four percent salary increase for the bargaining unit employees and other contract terms. The proposed agreement added holidays, bereavement leave, severance benefits, and increased insurance caps. (R. ex. 6) According to Nelson, on March 17, 2005, Harbin met with the entire bargaining unit, rather than just the negotiating team, to discuss these proposals.

17. Through the months of the negotiations, the bargaining unit members told Rushing that they wanted to wait before agreeing to a new contract. Rushing testified that no bargaining unit member, including

Nelson, explained the reason for wanting to wait. Rushing testified that she told Harbin that the bargaining unit members wanted to wait before agreeing to a contract and that he did not object. Harbin asked Rushing to show someone around the buildings with regard to cleaning. However, Rushing did not know to whom Harbin was referring and Harbin never sent anyone to look at the buildings.

18. In April 2005, the maintenance and custodial employees met and discussed decertifying Local 773 as their exclusive bargaining representative. According to Nelson, the employees were unhappy with Local 773 but not with the terms of the proposed collective bargaining agreement.

19. On May 9, 2005, Price presented the proposed 2005-2008 collective bargaining agreement to the bargaining unit members. The proposed agreement contained a four percent salary increase for all of the bargaining unit employees. The bargaining unit members wanted to postpone the ratification vote. Price advised the members that it was a good agreement. The bargaining unit members told Price that they liked the agreement but did not want to stay with Local 773. During the meeting, Price told the bargaining unit members that Harbin had told him if the proposed agreement was not ratified, the District would consider bringing in outside workers to perform the bargaining unit work.[3] Price testified that he tells the bargaining unit members everything that is said so that they understand the issues facing them. Price testified that he considered the statement as merely a negotiating tactic intended to reach ratification. Nelson testified that Rushing stated in the meeting that if the agreement was not ratified, the District would replace the maintenance employees with outside contractors. No bargaining unit employee told Price that he or she felt threatened, and Price never asked if anyone considered it a threat.

20. The bargaining unit members told Rushing that they were interested in joining another union. Rushing was also interested in joining another union and she talked to Julie Newell, who at that time, was employed with the District as a grants and secretary/bookkeeper. Newell is also a member of the Board of Directors of the Illinois Education Association ("IEA").

21. According to Harbin, during the summer months the District needed to ready the school buildings for the new school year. Accordingly, if the proposed agreement was not ratified by June 30, 2005, the

[3] We find that Price testified that Harbin had made this statement. (Tr. 272).

District would consider bringing in outside contractors to perform the necessary work. Harbin talked to Rushing about the need to consider alternatives if the agreement was not ratified by June 30. If the District contracted out the work, Harbin assumed that the employees could lose their positions.

22. Nelson testified that, after the meeting, he and the other bargaining unit members met. According to Nelson, the bargaining unit members were satisfied with the proposed agreement, but wanted to move to another exclusive representative.

23. Sometime within a week after the meeting, Nelson met with Interim Superintendent Samuel Harbin. According to Harbin, Nelson told him that he represented the bargaining unit members. Nelson told Harbin that he was not concerned about the proposal, but was concerned with leaving Local 773. Harbin testified that he told Nelson that Rushing was the representative for Local 773, and he could not speak with Nelson. Harbin testified that he told Nelson that his Nelson's wish to be out of Local 773 was not his business, and he would consider outside contractors if necessary to ready the schools for the next school year. According to Nelson, Harbin told him that the bargaining unit members had to sign the proposed agreement and had to stay with Local 773 as their exclusive bargaining representative. Nelson testified that Harbin told him that if the bargaining unit did not ratify the agreement, the District would contract out their work.[4] Nelson did not relay the contents of this conversation to the other bargaining unit members prior to their decision to ratify the agreement.[5]

24. Harbin did not recall Rushing telling him that the bargaining unit was having problems with Local 773 and wanted to join IEA. Harbin testified that his aim was to procure an amiable agreement and that if the bargaining unit members did not want to stay with Local 773, that was their problem.

25. On the same day, Rushing brought to Harbin the signatures of seven of the nine members of the maintenance bargaining unit ratifying the proposed agreement.[6] Nelson did not agree to ratify the agreement. (C. ex. K) The other employee who did not sign the agreement was on sick leave.

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[4] The District asserts that ALJ Purcell failed to make a credibility determination regarding this conversation. However, we regard such a credibility determination as unnecessary to our disposition of this case. The testimony is not in conflict with regard to whether Harbin raised the possibility of the District contracting out the employees' work if they did not ratify the contract.

[5] We take official notice, pursuant to Section 1105.200 of the Rules of the Illinois Educational Labor Relations Board, 80 Ill. Admin. Code 1105.200, that Nelson filed a decertification petition on May 13, 2005.

[6] ALJ Purcell found that Rushing brought the signatures to Harbin on May 11, 2005. However, the document containing the signatures is dated May 16, 2005. (R. ex. 6). We correct this error and incorporate Harbin's testimony that Rushing came to see him on the same day as Nelson did. (Tr. 243).

Rushing testified that one of the bargaining unit members telephoned her and told her that the members were ready to sign the agreement. Rushing prepared the signature page, which she took to each member for signature. Rushing testified that she did not know why the members decided to ratify the agreement.

26. Prior to Nelson filing an unfair labor practice charge on May 20, 2005, Harbin told Nelson that he was pleased with his job performance. Nelson testified that after he filed the unfair labor practice charge, Harbin told him that he would file charges against Nelson for interfering with union activity. Nelson further testified that Harbin told him that Nelson was forcing the District to "tighten the screws down tighter."[7]

27. On July 1, 2005, Gary Whitledge became District Superintendent. Harbin served as an advisor to Whitledge until September 2005. While serving as advisor, Harbin discussed the various District issues including maintenance, personnel, and past practices with Whitledge. Harbin also told Whitledge of the unfair labor practice charge that Nelson had filed in May 2005.[8]

28. According to Nelson, shortly after becoming Superintendent, Whitledge told Nelson that he realized Nelson had a difficult job, but that he envied Nelson for his job. Nelson testified that Whitledge told him that Nelson was doing a good job and that it was a pleasure to work with him. Whitledge described Nelson as incredibly gifted with incredible skills for maintenance and diagnosis.

29. In July 2005, Nelson did not receive the four percent pay raise specified in the maintenance workers 2005-08 collective bargaining agreement. Nelson spoke to Harbin and then to Whitledge after he did not receive the pay increase. Whitledge informed Nelson that he would not receive the pay raise because he received a ten percent salary increase upon accepting the Maintenance Head position in February 2005.

30. In July 2005, Nelson reported to Harbin and to the police department that a utility trailer belonging to the District had been stolen. In a letter dated July 20, 2005, Harbin informed Nelson that before taking any action regarding the utility trailer, the District would wait thirty days to see if the trailer would be

[7] The District incorrectly asserts that these statements by Harbin are hearsay. Rather, these statements are properly characterized as admissions or as offered to prove the District's state of mind, rather than the truth of the matter asserted.

[8] We find that Whitledge testified that Harbin informed him of the charge "probably…somewhere in August or September." (Tr. 310-11). We find that Whitledge also testified that he felt that, once the charge was responded to, "that would be it." (Tr. 341).

returned. Accordingly, Nelson borrowed a trailer from a friend, which he attached to a District truck, in order to move some lockers for the District. After the thirty days elapsed, the District bought a new trailer. However, Nelson also continued to use the borrowed trailer to perform District business.

31. On approximately July 15, 2005, another of Nelson's friends wanted to use the trailer belonging to Nelson's friend to move some furniture. Nelson testified that during his morning break, which is scheduled for 10:00 – 10:15 a.m., but which he sometimes takes later, Nelson took the trailer to the home of the friend moving furniture, unhooked the borrowed trailer from the District truck and left. The District's name appears on the truck. Nelson's supervisor was not aware that he took the truck to his friend's residence. Nelson testified that he talked to Whitledge about the incident afterward and thought everything was all right. Nelson testified that he stopped at the friend's residence at approximately 1:00 p.m. to tell his friend that he could not get back there with his own truck. Nelson's assigned lunch period on July 20 was 12:00 to 1:00 p.m. From his office, Whitledge observed Nelson with the truck connected to the trailer at the residence. At the time, the trailer had furniture in it that did not belong to the District. Whitledge did not know at that time that the trailer did not belong to the District. Additionally, Whitledge testified that a Board member told him that previous Superintendent Isom had told Nelson not to use District property for his personal use. However, there was nothing in Nelson's file in that regard.

32. By letter dated July 20, 2005, Whitledge informed Nelson that he was suspended for using the District truck for non-District business. In the letter, Whitledge related that Nelson had been observed at 10:30 a.m. with the truck at a private residence. He wrote that Nelson[9] was again observed with the truck at the residence at 1:00 p.m. on that same date. Whitledge wrote that the previous Superintendent, Dr. Isom, had instructed Nelson not to use District property for personal use after he discovered Nelson used the District's lawn mower to cut the grass at Nelson's church. (C. ex. F) Whitledge directed Nelson that he was not to use District property for personal use. (C. ex. F)

[9] ALJ Purcell stated in her findings of fact that Whitledge wrote that Whitledge was again observed with the truck. We correct this error. See C. ex. F.

33. Nelson testified that he used the District's lawn mower to cut the grass at Nelson's church with Isom's permission. According to Nelson, Isom told Nelson to inform him when he was using the mower. [10] Nelson testified that he had previously loaned his lawn mower to the District. According to Nelson, Whitledge told Nelson what he thought occurred, and he did not consider Nelson's version of events. Nelson had no previous disciplinary actions in his personnel file.

34. By letter dated August 3, 2005, Whitledge informed Nelson that the Maintenance Head contract expired on June 30, 2005 and that the District elected not to renew the contract. Whitledge informed Nelson that he would be reverted back to his position on the salary scale previous to his accepting the Maintenance Head position and he would receive the four percent raise provided to all employees under the collective bargaining agreement. Whitledge wrote that the District would advertise the Maintenance Supervisor position, [11] and in the interim Nelson would function in that position reporting to Whitledge. (C. ex. E) Nelson testified that the District's decision not to renew his contract resulted in a salary decrease of approximately three thousand dollars.

35. Whitledge had discussed the non-renewal of the position, Nelson's reversion to his previous position and his placement on the salary scale with Price. Price agreed to the changes but did not inform Nelson before agreeing. According to Nelson, Price and Rushing told him that the agreement to waive overtime violated federal law and Local 773 had agreed to the change. However, at the time he received the letter, Nelson did not know that the Local 773 representatives had agreed that the contract would not be renewed and that Nelson would be reverted to a previous position with a four percent raise. At Nelson's request, Cairo Association of Teachers, IEA-NEA President Ron Newell attended a meeting on the matter because Nelson wanted a friendly witness in the meeting. Rushing attended the meeting as the Local 773 representative. Newell testified that their seemed to be quite a bit of confusion over the Maintenance Head agreement on the part of both the District and Local 773.

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[10] We find that, during a conversation with Nelson on August 12, 2004, Harbin informed Nelson that all agreements and/or practices approved by prior supervisors or District employees were null and void, and that henceforth all directions or approvals regarding maintenance activities would be a mutual decision between Nelson and the present superintendent. (Tr. 221-22; R. ex. 11). However, we also find that the context of this discussion was Nelson's use of overtime. (Tr. 221-22, 245).

[11] ALJ Purcell found, contrary to Whitledge's letter, that Whitledge wrote that the District would advertise the Maintenance Head position. We correct this error. See C. ex. E.

36. Whitledge testified that the District decided not to renew the contract after the District's legal counsel advised that the contract was not proper in light of the collective bargaining agreement between the parties and the contract contained no termination date. After eliminating the Maintenance Head position, the District posted a notice of vacancy for a new maintenance position.

37. Nelson never received a written evaluation as Maintenance Head or in his previous positions. Instead, Nelson's supervisors spoke to him if a problem arose. No testimony was presented at hearing as to whether any other bargaining unit members ever received written evaluations. Nelson testified that in the past, he continued to work in his position after the expiration of the collective bargaining agreement.

38. On August 19, 2005, Nelson filed an unfair labor practice charge with the IELRB in which he alleged that the District refused to give him a pay raise, suspended him without pay, and refused to renew his employment contract.[12]

39. Ron Newell, who attends most, if not all School Board meetings, testified that in the meetings, the Superintendent singled Nelson out for his excellent job performance. Newell did not hear any negative comments at the meetings after Nelson filed the unfair labor practice charge.

40. On September 15, 2005, Whitledge instructed Nelson to get parts for a District lawn mower. Nelson drove the District truck to Mounds, Illinois for the parts. Nelson testified that as he was driving back to Cairo, he observed a Board member following him and he waved to the Board member. Subsequently, the Board member informed Whitledge that he had seen Nelson on Hurn Road. Hurn Road is not on the direct route between Cairo and Mounds. Whitledge told Nelson of the report, and Nelson denied that he had been on Hurn Road.

41. By letter dated October 4, 2005, Whitledge informed Nelson that he would receive a written reprimand for his use on September 15, 2005 of the District's truck for purposes other than District business. Whitledge wrote that on September 15, a Board member had seen Nelson driving on Hurn Road. Whitledge wrote that after talking with Nelson, who denied being on Hurn Road, on September 16 and 19, Whitledge determined that Nelson had been on Hurn Road, and he had no official reason to be

[12] ALJ Purcell found that Nelson alleged in the unfair labor practice charge that the District's actions were taken in retaliation for his failure to ratify a tentative collective bargaining agreement. However, this is not stated in the charge. See ALJ ex. 6.

there. Whitledge informed Nelson that he would be required to fill out a vehicle log regarding his use of the truck that the District had assigned to him. Other employees also have access to the truck. Nelson has never asked whether other bargaining unit employees are required to complete a vehicle log when using the truck. Nelson testified that he took a direct route between Mounds and Cairo and was not on Hurn Road, which was not on the route, on September 15. He testified that he has never been on Hurn Road in his life. (C. ex. G)

42. On October 17 and 18, 2005, Nelson called in sick. As of October 18, 2005, Nelson had used thirteen sick leave days since the beginning of the school year on August 15, 2005. Nelson had sick leave remaining. Nelson testified that he has used the sick leave because he suffers from Type 1 diabetes, which went untreated for twelve to thirteen years. However, according to Nelson, since 2004 he has experienced complications causes by the disease, including retinal bleeding, fatigue, trouble walking, trouble seeing, and incontinence. He testified that he has had four or five eye surgeries. Nelson testified that the District has never compensated him for requiring him to see a physician for a certificate for every use of sick leave. However, Nelson never requested reimbursement.

43. By letter dated October 18, 2005, Whitledge informed Nelson that his excessive use of sick leave was disruptive to the daily functioning of the buildings and operations and, in accordance with the Illinois School Code, Nelson would be required to provide a physician's certificate in order to receive sick leave for any future sick leave absence. (C. ex. H) Nelson had never previously been required to provide a physician certificate in order to receive sick leave. Nelson testified that under Isom and under Harbin, a physician's certificate could be required for an absence of three consecutive days.

44. According to Whitledge, Nelson is the only skilled maintenance person in the District and his absence interferes with creating a reasonable environment in which the students can learn. Whitledge testified that the absences create a need to call in outside contractors to perform needed maintenance work.

45. Newell testified that the District requests a physician's certificate from employees in the event the employee undergoes surgery. Newell also testified that he used a great number of sick leave when his wife was ill and was not required to furnish a physician's certificate. Newell testified that he told Nelson that he believed that Nelson was being singled out. However, Newell did not know the extent of sick leave use of other members of Nelson's bargaining unit or whether the District required others

in Nelson's bargaining unit to provide a physician's certificate for use of sick leave. Newell told Nelson that, as the District was requiring him to submit a physician's certificate for every absence due to illness, the District was required to pay for Nelson's visits to the doctor to obtain the physician notes for use of sick leave.

46. By letter dated November 7, 2005, Whitledge notified another member of Nelson's bargaining unit who had used eleven sick days since the beginning of the school year, that due to excessive use of sick leave, he would be required to submit a physician's certificate in order to receive sick leave in the future. Nelson testified that, since receiving the October 18, 2005 letter, he has been required to provide a physician's certificate, but that the other employee has not been required to do so. However, Nelson does not know of any other bargaining unit employee who used as much sick leave as he had. No other bargaining unit member had used as many as eleven sick days by that point in the school year.

II.

ALJ McKay concluded that Harbin's statements threatening the contracting out of work violated Section 14(a)(1) of the Act. She determined that Harbin's statements would coerce a reasonable employee.

ALJ McKay also concluded that the District had violated Sections 14(a)(4), 14(a)(3) and 14(a)(1) of the Act by refusing to give Nelson a pay raise, suspending him without pay for personal use of a District vehicle, refusing to renew his employment contract as Maintenance Head, reprimanding him for personal use of a District vehicle on a second occasion, and requiring him to provide a physician's certificate when using sick leave. She determined that Nelson had established a prima facie case. She found that Nelson engaged in protected activity and that the District was aware of that activity. She also found that the timing of the District's actions against Nelson and additional evidence led to an inference that Nelson's protected activity was a substantially motivating factor in those actions. In addition, ALJ McKay determined that the District's asserted reasons for its actions against Nelson were pretextual.

III.

The District argues that ALJ McKay's conclusion that Harbin's statements violated Section 14(a)(1) of the Act is against the manifest weight of the evidence and should, therefore, be reversed. The District contends that there are contradictions in the testimony, that Harbin's statements were a common

negotiating tactic, and that Harbin's statements were not perceived as threatening. The District also contends that, assuming arguendo that Nelson has established that an objective person would be coerced by Harbin's statements, the District has an overwhelming, legitimate educational interest in ensuring that its facilities are ready for the school term, which justified any alleged interference with the employees' statutory rights.

The District also argues that it did not violate Sections 14(a)(4), 14(a)(3) and 14(a)(1) of the Act by refusing to give Nelson a pay raise, suspending him without pay for personal use of a District vehicle, refusing to renew his employment contract as Maintenance Head, reprimanding him for personal use of a District vehicle on a second occasion, and requiring him to provide a physician's certificate when using sick leave. The District asserts that ALJ McKay's Recommended Decision and Order is against the manifest weight of the evidence. The District argues that Whitledge did not know of Nelson's first unfair labor practice charge when he denied Nelson a pay raise, when he suspended Nelson or when he bargained the non-renewal of the Maintenance Head position. The District notes the timing of its decision to deny Nelson the pay raise. The District asserts that it had legitimate, non-discriminatory reasons to issue the July 20, 2005 suspension and the October 4, 2005 reprimand for personal use of a District vehicle. The District contends that Nelson did not produce any evidence that the District's reasons for the suspension were pretextual.

The District contends that it proved that its decision not to renew Nelson's employment contract as Maintenance Head was not made in retaliation for Nelson's protected activities. The District states that timing alone cannot support a finding of retaliation. The District argues that, because it negotiated with Local 773 concerning the non-renewal of Nelson's Maintenance Head contract, it did not violate the Act with respect to that action. The District argues that, because any agreement to require an employee to waive overtime compensation is illegal, ALJ McKay's recommended order that the District reinstate Nelson to his Maintenance Head position violates public policy.

The District contends that it has the right under Section 24-6 of the School Code, 105 ILCS 5/24-6, to require a physician's certificate after three days of absence. The District contends that the requirement that Nelson produce a physician's certificate was not an adverse action. The District argues that Nelson did not establish a causal connection between his alleged protected activity and the requirement. The District

asserts that the requirement of producing a physician's certificate was uniformly applied to members of Nelson's bargaining unit. The District argues that, because Section 24-6 of the School Code gives the District the right to require a physician's certificate, the ALJ's recommended remedy of rescinding the requirement is contrary to the public policy behind Section 24-6 and exceeds the jurisdiction of the IELRB.

Nelson argues that ALJ McKay's determination that Harbin threatened and/or coerced Nelson and members of the bargaining unit was not against the manifest weight of the evidence. Nelson argues that it is undisputed that Harbin at least said to Nelson, Price and Rushing that he would consider contracting out custodial and maintenance work if the new collective bargaining agreement was not ratified. Nelson contends that a reasonable employee would have been coerced by Harbin's statements and that the decisional wavering of the employees supports this.

Nelson asserts that ALJ McKay's Recommended Decision and Order is not against the manifest weight of the evidence. Nelson asserts that Isom had determined that any use of District property by Nelson was by permission, and that there was no substantial or sufficient evidence that Nelson had a history of misusing District property. Nelson contends that Whitledge failed to take the proper investigatory measures to determine whether Nelson had been on Hurn Road. Nelson argues that the District used a pretext to justify removing Nelson from the Maintenance Head position. Nelson contends that a retaliatory action should not be allowed to stand merely because an exclusive representative that failed to consult the employee acquiesced to the action. Nelson asserts that ALJ McKay's recommended order that Nelson be reinstated as Maintenance Head does not violate public policy. Nelson argues that the requirement to produce a physician's certificate was not uniformly applied to all members of the bargaining unit, and that the basis for requiring a physician's certificate was suspiciously changed. Nelson contends that the District's argument that the School Code gives it the absolute right to require a physician's certificate is baseless due to the alleged consistent pattern of retaliation.

IV.

We conclude that Harbin's threats concerning the contracting out of work violated Section 14(a)(1) of the Act. In determining whether an employer has violated Section 14(a)(1), the test is whether the employer's conduct "may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act," *Board of Education, City of Peoria School District No. 150 v. IELRB*, 318

Ill.App.3d 144, 150, 741 N.E.2d 690, 695 (4th Dist. 2000), *quoting Georgetown-Ridge Farm Community Unit School District No. 4 v. IELRB*, 239 Ill.App.3d 428, 465-66, 606 N.E.2d 667, 690 (1992). Specific evidence of interference with employee rights is not required. *Southern Illinois University (Edwardsville)*, 5 PERI 1077, Case No. 86-CA-0018-S (IELRB, April 4, 1989). Rather, an objective test is applied. *Id.* If the complainant establishes a prima facie case, the employer may defend by showing a legitimate reason for its actions that justified any interference with employees' exercise of their statutory rights, and then a balancing test is applied. *Id.*

Under this test, Harbin's threats to Price, Rushing and Nelson that the District might contract out the employees' work if they did not ratify the collective bargaining agreement violated Section 14(a)(1). This was conduct that "may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act." Section 3(a) of the Act, which sets forth employee rights, provides:

> It shall be lawful for educational employees to organize, form, join, or assist in employee organizations or engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or bargain collectively through representatives of their own free choice and…such employees shall also have the right to refrain from any or all such activities.

These rights clearly include the right to freely choose whether to ratify a collective bargaining agreement. The threats that the District might contract out the employees' work if they did not ratify the contract may reasonably said to have had a tendency to interfere with this right. With regard to the District's claim of contradictions in the testimony, Nelson correctly argues that it is undisputed that Harbin at least said to Price, Rushing and Nelson that he would consider contracting out custodial and maintenance work if the new collective bargaining agreement were not ratified. Whether the employees actually felt threatened is not relevant under the objective test that is applied. The employer's asserted legitimate reason for the threats—the need to ensure that the school facilities are ready for the next school term—is contradicted by the fact that there was no evidence that the employees would not have continued to work if the contract were not ratified. For these reasons, we affirm ALJ McKay's ruling that the District violated Section 14(a)(1) through Harbin's threats.

V.

We also conclude that the District violated Sections 14(a)(1), 14(a)(3) and 14(a)(4) of the Act when it suspended Nelson without pay for personal use of a District vehicle, refused to renew his

employment contract as Maintenance Head, reprimanded him for personal use of a District vehicle on a second occasion, and required him to provide a physician's certificate when using sick leave. However, we conclude that the District did not violate Sections 14(a)(1), 14(a)(3) and 14(a)(4) of the Act when it refused to give Nelson a pay raise.

Section 14(a)(1) of the Act prohibits educational employers and their agents or representatives from "[i]nterfering, restraining or coercing employees in the exercise of the rights guaranteed under this Act." Section 14(a)(3) of the Act prohibits educational employers and their agents of representatives from "[d]iscriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization." Section 14(a)(4) of the Act prohibits educational employers and their agents or representatives from "[d]ischarging or otherwise discriminating against an employee because he or she has signed or filed an affidavit, authorization card, petition or complaint or given any information or testimony under this Act."

In Section 14(a)(1) cases involving alleged employer retaliation for protected activity, a prima facie case is establishing by presenting evidence that the employee's activity was protected and concerted, the employer knew of the protected concerted activity, and the adverse employment action was motivated by the employee's protected concerted activity. *Neponset Community Unit School District No. 307*, 13 PERI 1089, Case No. 96-CA-0028-C (IELRB, July 1, 1997). A prima facie case of a Section 14(a)(3) violation is established by presenting evidence that the employee was engaged in activity protected by Section 14(a)(3), that the employer was aware of that activity, and that the employer took adverse action against the employee for engaging in that activity. *Board of Education, City of Peoria School District No. 150 v. IELRB*, 318 Ill.App.3d 144, 741 N.E.2d 690 (4th Dist. 2000); *Bloom Township High School District 206 v. IELRB*, 312 Ill.App.3d 943, 728 N.E.2d 612 (1st Dist. 2000). A prima facie case of a Section 14(a)(4) violation is established by showing that the employee used or participated in the IELRB's processes, that the employer was aware of that activity, and that the employer took adverse action against the employee in part because of that activity. *Peoria*.

Here, Nelson engaged in protected concerted activity when he spoke to Harbin and Whitledge about his failure to receive the four percent pay raise specified in the 2005-2008 collective bargaining agreement. Employees engage in concerted activity when they invoke a right based upon a collective

bargaining agreement. *Board of Education of Schaumburg Community Consolidated School District 54 v. IELRB*, 247 Ill.App.3d 439, 616 N.E.2d 1281 (1st Dist. 1993), *quoting Meyers Industries, Inc.*, 268 NLRB 493, 497 (1984), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (1985), *cert. denied* 474 U.S. 971 (1985), *on remand Meyers Industries, Inc.*, 281 NLRB 882 (1986), *aff'd Prill v. NLRB*, 835 F.2d 1481 (1987), *cert. denied Meyers Industries, Inc. v. NLRB*, 487 U.S. 1205 (1988). Nelson engaged in activity protected by Section 14(a)(3) through attending the May 9, 2005 meeting concerning the proposed 2005-2008 collective bargaining agreement and through his efforts to decertify Local 773, including meeting with other bargaining unit members, meeting with Harbin and filing the decertification petition. Nelson used the IELRB's processes when he filed unfair labor practice charges against the District, as well as when he filed the decertification petition..

Harbin and Whitledge were obviously aware that Nelson had spoken with them about his failure to receive the four percent raise. Harbin was aware that Nelson had discussed with him the possibility of the bargaining unit members leaving Local 773, and Nelson informed Harbin that he represented the bargaining unit members. It can be inferred that Harbin informed Whitledge of these matters because Harbin discussed various District issues with Whitledge including maintenance and personnel while serving as an advisor to Whitledge. The District was necessarily aware of Nelson's decertification petition and unfair labor practice charges, although Whitledge testified that Harbin did not inform him of Nelson's first charge until probably somewhere in August or September.

Nelson has also shown that the District's adverse actions against him were motivated by his activity protected by the Act. Improper motivation may be inferred from a variety of factors, such as an employer's expressions of hostility toward activity protected by the Act, together with knowledge of the employee's activity protected by the Act; timing; disparate treatment or a pattern of conduct that targets employees who engage in activity protected by the Act; inconsistencies between the reason the employer gives for its action and other actions of the employer; and shifting explanations for the employer's action. *See City of Burbank v. ISLRB*, 128 Ill.2d 335, 538 N.E.2d 1146 (1989); *Neponset*.

Here, the timing of the District's adverse actions against Nelson supports an inference that its motives were illegitimate. Nelson engaged in his activity protected by the Act in May, July and August

2005. The District took its adverse actions against him in July, August and October 2005. Prior to that time, Nelson had no disciplinary actions in his personnel file.

In addition, Harbin expressed hostility toward Nelson's activity protected by the Act when he told Nelson that he would file charges against him for interfering with union activity and that Nelson was forcing the District to "tighten the screws down tighter" as a result of what Nelson had done. While Whitledge was not shown to have expressed such hostility and testified that Harbin did not inform him of Nelson's first charge until probably somewhere in August or September 2005, Harbin was advising Whitledge concerning District issues including maintenance, personnel and past practices until September 2005. Where an adverse action results from the involvement or recommendation of an employer representative who is hostile to activity protected by the Act, the adverse action is unlawful even if the decision-maker is not proven to have such hostility or even to be aware of the employee's activity. *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112 (6th Cir. 1987); *City of Harvey*, 18 PERI 2032 (Illinois Labor Relations Board, State Panel 2002).

Furthermore, the District gave shifting explanations for its decision not to renew the Maintenance Head contract. Whitledge testified that the District decided not to renew the contract after the District's legal counsel advised that the contract was not proper in light of the collective bargaining agreement between the parties and the fact that the contract contained no termination date. However, the District states in its brief that the District did not renew the contract because the District had determined that it could not require Nelson to forfeit overtime compensation. There is also evidence that Nelson was treated differently from other employees in that Newell was not required to furnish a physician's certificate although he used a great amount of sick leave. In addition, in *Peoria School District 150*, 23 PERI ___, Case Nos. 2006-CA-0002-S et al. (IELRB, September 20, 2007), the IELRB stated: "the National Labor Relations Board has found that an employer's commission of other unfair labor practices establishes animus and that an employer who has violated rights under the Act in other respects demonstrates an inclination to such conduct. *Cardinal Home Products*, 338 NLRB 1004 (2003); *J.R.L. Food Corp. d/b/a Key Food*, 336 NLRB 111 (2001)" (slip opinion at 5).

Where a prima facie case has been established, the employer must show that it would have taken its actions for a legitimate business reason notwithstanding its improper motivation in order to avoid a

determination that it violated the Act. *See City of Burbank*. A case may be characterized as "pretext" or "dual motive." In a "pretext" case, the employer's suggested reasons for its action are created for the purpose of litigation or were not relied on. In a "dual motive" case, the employer states legitimate reasons for its action and is found to have relied on them in part. The employer must then show that it would have taken the action against the employee notwithstanding his/her activity protected by the Act. *See City of Burbank*.

With regard to the District's refusal to give Nelson a pay raise, the reason Whitledge gave Nelson is that Nelson received a 10 percent salary increase upon accepting the Maintenance Head position in February 2005. There is evidence that this reason is legitimate in that, when Harbin proposed a salary increase for the bargaining unit on January 6, 2005, he did not include Nelson's name in the list of bargaining unit employees who would receive the salary increase. This occurred before Nelson's activity protected by the Act. For the same reason, the District has shown that it would have denied Nelson the pay raise in July 2005 notwithstanding his activity protected by the Act. The District did not violate Section 14(a)(1), 14(a)(3) or 14(a)(4) of the Act by refusing to give Nelson a pay raise in July 2005.

With regard to the District suspending Nelson without pay for personal use of a District vehicle, the reasons that the District asserts in its brief are liability concerns and an expectation that an employee will spend his work day and use the employer's property for the employer's purposes. However, there appears to have been a practice tolerated by former Superintendent Isom of Nelson's using non-District property for District business and District property for non-District business. Whitledge's testimony that a Board member told him that Isom had told Nelson not to use District property for his personal use is hearsay and is, therefore, entitled to less weight. Harbin's August 12, 2004 discussion with Nelson about the effect of practices approved by prior supervisors can reasonably be interpreted as limited to overtime. There, the District's asserted reasons for suspending Nelson are pretexts. The District violated Sections 14(a)(1), 14(a)(3) and 14(a)(4) of the Act by suspending Nelson.

With regard to the District's refusing to renew Nelson's contract as Maintenance Head, the District asserts in its brief that the District was in dire financial straits and that, once the District determined that it could not require Nelson to forfeit overtime compensation, it realized that it would save nothing for the District to continue to keep Nelson in the Maintenance Head position and pay him overtime

compensation. However, the District has offered shifting reasons for its refusal to renew Nelson's contract as Maintenance Head. Therefore, its asserted reasons are pretexts. The District violated Sections 14(a)(1), 14(a)(3) and 14(a)(4) by refusing to renew Nelson's contract as Maintenance Head.[13]

With regard to the District's reprimand of Nelson for personal use of a District vehicle on a second occasion, the District asserts in its brief that Whitledge had legitimate reasons to be concerned about Nelson's use of a District vehicle given Nelson's history of misusing District property and the interest that the District has in knowing the whereabouts and uses of its property at all times. As ALJ McKay noted, Nelson did not have a reported history of misuse of District property prior to participation in activities protected by the Act, and no evidence was presented that Whitledge instructed Nelson to take a specific route. Therefore, the District's asserted reasons are pretexts. The District violated Sections 14(a)(1), 14(a)(3) and 14(a)(4) by reprimanding Nelson for personal use of a District vehicle on a second occasion.

With regard to the District's requirement that Nelson provide a physician's certificate when using sick leave, it can be inferred that the District has an interest in ensuring that employees do not abuse sick leave. In addition, Whitledge testified that Nelson's absences create a need to call in outside contractors. However, this requirement was not uniformly enforced. Newell was not required to furnish a physician's certificate when he used a great amount of sick leave. It can be assumed that the District needed to provide someone to perform Newell's work when he was absent. We find this evidence persuasive notwithstanding the fact that Newell was not a member of Nelson's bargaining unit. Therefore, the District has not provided a legitimate reason for requiring Nelson to provide a physician's certificate when using sick leave. The fact that the District may have had the authority to require a physician's certificate does not entitle it to exercise that authority in a discriminatory manner. The District violated Sections 14(a)(1), 14(a)(3) and 14(a)(4) by requiring Nelson to provide a physician's certificate when using sick leave.[14]

[13] The District argues that it did not violate the Act by refusing to renew Nelson's Maintenance Head contract because it bargained over the issue with Local 773. However, an employer does not relieve itself of a violation of an employee's individual statutory rights by obtaining the acquiescence of the union.

[14] The District argues that the requirement that Nelson furnish a physician's certificate was not an adverse action. The cases that the District refers to in support of this argument are non-precedential ALJ decisions. The fact that the District placed a requirement on Nelson is sufficient to constitute an adverse action. This is the case regardless of whether the District was authorized to impose such a requirement.

VI.

We conclude that the District violated Section 14(a)(1) of the Act through Harbin's threats to contract out work. We conclude that the District did not violate Sections 14(a)(1), 14(a)(3) and 14(a)(4) of the Act by refusing to give Nelson a pay raise in July 2005, but that the District violated Sections 14(a)(1), 14(a)(3) and 14(a)(4) by suspending Nelson without pay for personal use of a District vehicle, by refusing to renew his Maintenance Head contract, by reprimanding him for personal use of a District vehicle on a second occasion, and by requiring him to provide a physician's certificate when using sick leave.

Wherefore, **IT IS HEREBY ORDERED** that Cairo School District No. 1

1 Cease and desist from:

a. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed under the Act.

b. Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization.

c. Discriminating against an employee because he/she has signed or filed an affidavit, authorization card, petition or complaint or given any information or testimony under the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

a. Expunge from its files, including Nelson's personnel file, any and all documents or references relating to discipline issued in retaliation for Nelson's activity protected by the Act, including his suspension and reprimand for use of the District truck for other than the District's business, and any and all documents or references relating to the requirement that Nelson furnish a physician's certificate when using sick leave.

b. Rescind the requirement that Nelson furnish a physician's certificate when using sick leave.[15]

c. Make Nelson whole for the District's unlawful discrimination and retaliation against Nelson for participation in activity protected by the Act.

d. Make Nelson whole for the elimination of his Maintenance Head position, including restoration of his contract.[16]

[15] The District argues that, because Section 24-6 of the School Code gives the District the right to require a physician's certificate, ALJ McKay's recommended remedy of rescinding the requirement is contrary to the public policy behind Section 24-6 and exceeds the jurisdiction of the IELRB. However, the fact that the District may have had the authority to require employees to provide a physician's certificate does not entitle it to exercise that authority in a manner that discriminates in violation of the Act. The IELRB has full authority to fashion remedies that make whole the victims of unfair labor practices. *See Paxton-Buckley-Loda Education Association v. IELRB*, 304 Ill.App.3d 343, 710 N.E.2d 538 (4th Dist. 1999).

e. Preserve and, upon request, make available to the IELRB or its agents for examination and copying all records, reports and other documents necessary to analyze the amount of remedy due under the terms of this Opinion and Order.

f. Post in all District buildings on bulletin boards or other places reserved for notices to employees copies of an appropriate Notice to Employees. Copies of this Notice, a sample of which is attached, shall be provided by the Executive Director. This Notice shall be signed by the District's authorized representative and maintained for 60 calendar days during which the majority of employees are working. The District shall take reasonable steps to ensure that said Notices are not altered, defaced, or covered by any other materials.

g. Notify the Executive Director in writing within 35 calendar days after receipt of this Opinion and Order of the steps taken to comply with it.

XIII. Right to Appeal

This is a final order of the Illinois Educational Labor Relations Board. Aggrieved parties may seek judicial review of this Order in accordance with the provisions of the Administrative Review Law, except that, pursuant to Section 16(a) of the Act, such review must be taken directly to the appellate court of the judicial district in which the Board maintains an office (Chicago or Springfield). "Any direct appeal to the Appellate Court shall be filed within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision," 115 ILCS 5/16(a).

Decided: December 11, 2007
Issued: December 12, 2007
Chicago, Illinois

/s/ Lynne O. Sered
Lynne O. Sered, Chairman

/s/ Ronald F. Ettinger
Ronald F. Ettinger, Member

/s/ Bridget L. Lamont
Bridget L. Lamont, Member

[16] The District argues that, because an agreement requiring an employee to waive overtime is illegal, ALJ McKay's recommended order that it reinstate Nelson to his Maintenance Head position violates public policy. We shall require that the District reinstate Nelson to his Maintenance Head position insofar as is legally permissible. Whether the District has done so shall be determined in compliance proceedings.

/s/ Michael H. Prueter
Michael H. Prueter, Member

/s/ Jimmie E. Robinson
Jimmie E. Robinson, Member

Illinois Educational Labor Relations Board
160 North LaSalle Street, Suite N-400
Chicago, Illinois 60601
Telephone: (312) 793-3170

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Cairo School District No. 1
Case Nos. 2005-CA-0034-S, 2006-CA-0003-S

Pursuant to an Opinion and Order of the Illinois Educational Labor Relations Board and in order to effectuate the policies of the Illinois Educational Labor Relations Act ("Act"), we hereby notify our employees that:

This Notice is posted pursuant to an Opinion and Order of the Illinois Educational Labor Relations Board issued after a hearing in which both sides had the opportunity to present evidence. The Illinois Educational Labor Relations Board found that we have violated the Act and has ordered us to inform our employees of their rights.

Among other things, the Act makes it lawful for educational employees to organize, form, join or assist employee organizations or engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection.

We assure our employees that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of rights guaranteed under the Act.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization.

WE WILL NOT discriminate against an employee because he/she has signed or filed an affidavit, authorization card, petition or complaint, or given any information or testimony under the Act.

WE WILL make Lorenzo Nelson whole for our unlawful discrimination and retaliation against him for participation in activity protected by the Act, including restoration of his Maintenance Head contract insofar as is legally permissible.

WE WILL expunge from our files, including Lorenzo Nelson's personnel file, any and all documents or references relating to discipline issued in retaliation for Nelson's activity protected by the Act and any and all documents or references relating to the requirement that Nelson furnish a physician's certificate when using sick leave.

WE WILL rescind the requirement that Nelson furnish a physician's certificate when using sick leave.

CAIRO SCHOOL DISTRICT NO. 1

By:_____Dated:_____
(Representative) (Title)

-NOTICES TO BE POSTED MUST BE OBTAINED
FROM THE EXECUTIVE DIRECTOR OF THE IELRB-

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